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IN THE DISTRICT COURT OF GUAM
TERRITORY OF GUAM

ARNOLD DAVIS, on behalf of himself and all others similarly situated,	)	Civil Case No. **11-00035**
Plaintiff,	)	
vs.	)	**DEFENDANTS' MEMORANDUM OPPOSING PLAINTIFF'S MOTION FOR ATTORNEY FEES**
GOVERNMENT OF GUAM; GUAM ELECTION COMMISSION; ALICE M. TAIJERON; MARTHA C. RUTH; JOSEPH F. MESA; JOHNNY P. TAITANO; JOSHUA F. TENORIO; and DONALD I. WEAKLEY, in the official capacities,	)	
Defendants.	)	

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Come Now, the Defendants, by and through the Attorney General of Guam, who hereby submit the following memorandum opposing Plaintiff's motion for attorney fees.

I. INTRODUCTION

This case involves a claim by a resident of Guam who is not eligible to participate in a plebiscite concerning Guam's future political relationship with the United States because he is not a Native Inhabitant. Mr. Davis alleges that Guam's Native Inhabitant classification, as defined by a Guam statute authorizing the plebiscite, is an unlawful proxy for race.

On March 8, 2017, this court granted Plaintiff's motion for summary judgment finding that Guam's plebiscite statute impermissibly imposes race-based restrictions on the voting rights of non-Native Inhabitants of Guam in violation of the Fourteenth and Fifteenth Amendments. ECF 149, p. 25. In finding these amendments were "clearly violated", the court declined to rule on Plaintiff's claims that the plebiscite also violated Guam's Organic Act and the Voting Rights Act. *Id.*

This is not a factually complex case. Mr. Davis is a Caucasian who was not allowed to register to participate in the plebiscite because he is not a Native Inhabitant of Guam. Yet Plaintiff requests attorney fees and costs in the amount of nearly one million dollars on a case that never went to trial.

"An award of attorney's fees under a fee-shifting statute isn't a prize to the winning lawyer. Rather, it compensates the prevailing party for legal fees prudently incurred." *Guam Society of Obstetricians and Gynecologists v. Ada*, 100 F.3d 691, 706-07 (9th Cir. 1996) (Kozinski, J., dissenting), This Court should reject Plaintiff's request and make an award of reasonable compensation for the amount of work reasonably done on this case.

II. PLAINTIFF HAS FAILED TO MEET HIS BURDEN OF ESTABLISHING THE ENTITLEMENT TO ATTORNEY FEES IN THE AMOUNT CLAIMED

Attorneys' fees may be awarded for work that is useful and of a type ordinarily necessary to secure the final result obtained from the litigation. *Nadarajah v. Holder*, 569 F.3d 906, 923 (9th Cir. 2009). Under the "lodestar method" of calculating attorney fees, the district court multiplies a reasonable number of hours by a reasonable hourly rate. *Stetson v. Grissom*, 821 F.3d 1157, 1166 (9th Cir. 2016). Parties seeking fees bear the burden of establishing the entitlement to attorney fees and the amount due. *Hensley v. Eckerhart*, 461 U.S. 424, 437 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). Parties must submit evidence supporting hours worked and rates, and the district court can reduce fee awards where documentation of hours and rates is inadequate. *Id.*, 433. Time that is not reasonably expended on a case can be excluded from the attorney fee calculation. *Id.*, 434.

Here plaintiff has failed to meet his burden of establishing the entitlement to attorney fees in the amount claimed. He has failed to show the hourly rate charged is reasonable and that the number of hours are reasonable.

A. PLAINTIFF' HAS FAILED TO SHOW HE COMPUTED HIS ATTORNEY FEES BASED UPON A REASONABLE HOURLY RATE

In addition to setting the number of hours, the court must determine a reasonable hourly rate, "considering the experience, skill, and reputation of the attorney requesting fees." *Chalmers v. City of Los Angeles*, 796 F.2d 1205, 1210 (9th Cir.1986). This determination "is not made by reference to rates actually charged by the prevailing party." *Id.* A district court should calculate this reasonable hourly rate "according to the prevailing market rates in the relevant community," *Blum v. Stenson*, 465 U.S. 886, 895, 104 S.Ct. 1541, 1547, 79 L.Ed.2d 891 (1984), which typically is the community "in which the district court sits." *Davis v. Mason County*, 927 F.2d 1473, 1488 (9th Cir.), cert. denied, 502 U.S. 899, 112 S.Ct. 275, 116 L.Ed.2d 227 (1991).

In *Gates v. Deukmejian*, 987 F.2d 1392 (9th Cir.1993), the Ninth Circuit recognized a narrow exception to this rule. *Gates* held that the district court did not abuse its discretion in awarding fees to San Francisco lawyers at San Francisco market rates—even though the forum district was Sacramento—where the plaintiffs had proven that "local counsel [in Sacramento] was unavailable, either because they are unwilling or unable to perform because they lack the degree of experience, expertise, or specialization required to handle properly the case." *Id.* at 1405.

It is this narrow exception under which Plaintiff claims this court should apply attorney fees rates applicable in the Washington, D.C. area where all three of Plaintiff's off-island law firms have offices. Plaintiff claims no qualified local attorneys would take his case. ECF 162-1, pp. 3 - 4. Mr. Christian Adams, one of Plaintiff's off-island lawyers, claims he contacted numerous members of the Guam bar seeking an attorney, but that no one would represent Plaintiff.[1]

In response to Plaintiff's motion for attorneys' fees and costs, Defendants contacted six local firms considered to be qualified to handle the Plebiscite litigation. One firm did not respond at all, another firm indicated they had no response to make. The remaining four firms indicated they had not previously been contacted by Plaintiff or his attorney. One firm, who has experience in bringing civil rights litigation and federal court litigation, indicated they would have taken the plebiscite case if they had been contacted. A lawyer with one of the other contacted firms indicated his firm could have taken the case. However, now that the case has been adjudicated, he declined to speculate as to whether or not the firm would have taken it in the first place. Another firm indicated they would not have taken the case because they are a defense firm. One firm indicated

[1] Mr. Adams declaration is vague and ambiguous. He does not state that no Guam attorney would take the case, but only that no Guam attorney he considered to possess "significant experience in contested litigation in the United States District Court or with a measure of expertise in either elections or Guam politics" was willing to take the case. Nor does he specify how he contacted the 27 Guam bar members. Clearly, he spoke with some of them, but did he speak to all of them or merely send an email? *See* ECF 162-1, pp. 3-5.

they would not have taken the case because of the political nature of the issues involved. Declaration of Duane J. Sablan ("Sablan Decl.").

Historically, Guam's attorneys have represented plaintiffs in divisive or controversial causes. *See*, e.g. *Guam Society of Obstetricians and Gynecologists v. Ada, supra* (constitutional challenge to Guam's anti-abortion statute); *Aguero v. Calvo*, 2016 WL 1050251 (civil rights case seeking marriage equality by same sex couple); and *Morgan Wade Paul v. Roman Catholic Archbishop of Agana*, Guam Dist. Ct. Civil Case No. 17-00026 (Suit alleging sex abuse by former Priest of the Guam Agana Archdiocese). (Decl. Orcutt.) It appears there were Guam attorneys willing and qualified to take this case.

In seeking counsel, Plaintiff incorrectly assumed that the local community was limited to Guam as opposed to including the CNMI. In his dissent in *Guam Society of Obstetricians and Gynecologists v. Ada, supra*, Judge Kozinski, noted at p. 714:

> Insofar as the district court based its finding on the absence of other local counsel competent to handle the case, it was clearly mistaken. Experience shows there are plenty of lawyers in ***Guam and Saipan*** who could have handled this case. This remote corner of our circuit regularly gives rise to sophisticated litigation involving difficult legal questions on a wide variety of subjects.... Attached as Appendix B is a list of some of the ***lawyers from Guam and Saipan*** who, according to published reports, have handled complicated cases in the federal courts. Any of these lawyers—and probably many others—would have been perfectly capable of handling this case.

(Emphasis added.)

Defendants communicated with seven attorneys in the CNMI to see if they would have taken the case. Two lawyers indicated they would have taken the case. Another indicated this was the type of cases his office handles and that he would have taken the case if it were in the CNMI. Another indicated he would need to become more acquainted with the case before deciding to take it. A fifth lawyer indicated he would have been happy to speak to anyone regarding representation.

Two lawyers indicated they would not take the case, but only one indicated it was because he disagreed with the underlying basis of Davis' suit. Declaration of Brenda Aguon.

It is not surprising that CNMI lawyers would have taken this case. Since 2012, CNMI attorney Jeanne Rayphand[2] has represented a CNMI voter, who is not of Northern Marianas descent, in litigation challenging a provision of the constitution of the Commonwealth of the Northern Mariana Islands restricting voting in certain elections to individuals of Northern Marianas descent. *See Davis v. Commonwealth Election Com'n*, 990 F.Supp.2d 1089 (Dist. NMI, 2012); aff'd *Davis v. Commonwealth Election Commission*, 844 F.3d 1087 (9th Cir. 2016).

As noted by Judge Kozinski in *Ada* at p. 705, where plaintiffs

> ...hired lawyers who came from another hemisphere (35 hours of flight time—all billed at New York City rates). Plaintiffs were, of course, free to hire the attorneys, local or otherwise, in whom they had confidence. But they were not entitled to have someone else pay extraordinary legal fees when there were plenty of local lawyers who could have handled the case at normal rates. The contrary finding—which is the fulcrum of the district court's ruling and our opinion today—is an affront to the dignity and reputation of a community of lawyers who have consistently served their clients and this court with professionalism and dedication.

While Mr. Davis is entitled to retain special interest lawyers from Washington, D.C, he is not entitled to have Guam pay extraordinary legal fees charged by them. This court should refuse to apply Washington, D.C. rates for Plaintiff's attorneys work.

The appropriate rate on Guam to be charged for senior attorneys is $350 and a rate of $150 for junior attorneys. These rates were found reasonable by this court in *Paeste v. Government of Guam*, 2013 WL 6254669 (rejecting application of San Francisco attorney fees rates and applying Guam rates).[3] These rates may actually be high. Special Assistant Attorney General Aguon charged $200 per hour for his time on this case and Special Assistant Attorney General Georgette Conception charges $175 per hour for her work representing the Guam Solid Waste Authority Board. Declaration of Kenneth Orcutt. Plaintiff's own local attorney, Mun Su Park, a Guam/Saipan attorney with 15 to 20 years of practice charges $250 per hour and believes that is a reasonable rate for Guam. ECF 162-7, page 2.

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[2] Defendants were unsuccessful in contacting Jeanne Hubbard Rayphand to learn if she would have taken this case. Dec. Aguon.

[3] That the Guam District Court in *Paeste* applied local Guam rates for the San Francisco law firm's attorneys' fees request did not deter the same firm from bringing a subsequent civil rights action on Guam seeking attorney fees. *See Vicente Palacios Crawford vs AB Won Pat International Airport Authority; Ricardo C. Duenas, Eddie Baza Calvo*, et. al., Guam District Court Civil Case No. 15-00001. Due to Guam's distance from the mainland, the attorneys fees to be awarded off-island counsel when no local counsel is available should be an amount sufficient to attract qualified

Plaintiff's off-island counsel hourly rates should be reduced to $350 per hour. If the court accepts the hours submitted by Plaintiff as being reasonable, off-island counsel should be awarded a total of $616,105 (Election Law Center (Adams): $251,825; Center for Individual Rights (Rosman): $158,655; and Gibson Dunn: $205,625.)

B. PLAINTIFF HAS FAILED TO SHOW THE NUMBER OF HOURS BILLED ARE REASONABLE

1. Plaintiff's Billing Records Fail to Comply with CVLR Rule 54

Many of Plaintiff's billings violate CVLR 54 and lack sufficient detail for the Court to make a determination as to their reasonableness. Parties seeking fees must present time records that enable the identification of the task for which time is being charged. *Hensley,* at 437. "Block billing" time record entries, in which several tasks are combined in one entry, will not support a fee award because the court cannot determine if the time was appropriate to the task. *Leroy v. Houston,* 906 F.2d 1068 (5^{th} Cir. 1990). Vague or generic entries, such as "research", "conference" or "review of document", that do not identify subject matter, purpose, or details of work done also will not support a fee award. *Cristancho v. NBC*, 117 FRD 609 (N.D. Ill., 1989). The court described the problem with generic time entries in *In re Olsen,* 884 F.2d 1415 (D.C. Cir. 1989):

> Examination of the application reveals numerous instances where the billing entries were not adequately documented. This defect in adequate record keeping is most prevalent among lawyers billing at the highest rates. For example, there are multitudinous billing entries, included among other entries for a particular day, that

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off-island counsel to act as counsel. The $350 per hour rate approved for the San Francisco firm in *Paeste* is sufficient to attract off-island counsel.

> wholly fail to state, or to make any reference to the subject discussed at a conference, meeting or telephone conference.

District courts have the authority to reduce hours that are billed in block format because such a billing style makes it difficult for courts to ascertain how much time counsel expended on specified tasks. *Welch v. Metropolitan Life Ins. Co.*, 480 F.3d 942, 948 (9th Cir.2007). *See* also *Role Models Am., Inc. v. Brownlee*, 353 F.3d 962, 971 (D.C.Cir.2004) (reducing requested hours because counsel's practice of block billing "lump[ed] together multiple tasks, making it impossible to evaluate their reasonableness"); *See* also *Hensley v. Eckerhart*, 461 U.S. at 437) (holding that applicant should "maintain billing time records in a manner that will enable a reviewing court to identify distinct claims").

Consistent with these concerns, CVLR 54(c)(A) sets forth requirements regarding the specificity needed in order for a court to evaluate a fee request. CVLR 54(c)(A) provides in relevant part:

> The party seeking an award of fees must describe adequately the services rendered, so that the reasonableness of the requested fees can be evaluated. In describing such services, counsel should be sensitive to matters giving rise to attorney-client privilege and attorney work product doctrine, but must nevertheless furnish an adequate non-privileged description of the services in question. If the time descriptions are incomplete, or if such descriptions fail to describe adequately the services rendered, the Court may reduce the award accordingly. **For example, time entries for telephone conferences must include an identification of all participants and the reason for the call; entries for legal research must include an identification of the specific issue researched and, if possible, should identify the pleading or document for which the research was necessary; entries describing the preparation of pleadings and other papers must include an identification of the pleading or other document prepared and the activities associated with such preparation**.

(Emphasis added.)

Here many of the billing entries fail to provide the sufficient detail required by CVLR 54. Of the hours claimed by all counsel in this fee request, roughly 269 hours derive from billing entries that lack sufficient detail for the Court to make a determination as to reasonableness.

By way of example, on September 13, 2011, Attorney Adams billed 9:00 hours for "Telephone calls and emails to dozens of Guam contacts and potential witnesses. Telephone conversation with local lawyers. Gathering of documentary evidence and photographic evidence. Research of Guam Dept. of Chamorro affairs." *See* Sablan Decl. ¶ 7, Ex. A (Entries Lacking Detail). By combining several tasks into one entry, the Court is unable to determine whether the 9:00 hours billed were appropriate.

Attorney Rosman's fee request includes numerous entries such as "mtg w/ C. Adams and T. Pell"; "tel call w/ Adams and tel call w/ T. Pell; review emails"; and "conf. call w/ C. Adams and S. Martin". *See* Sablan Decl. ¶ 7, Ex. A (Entries Lacking Detail). These entries fail to provide any detail of the substance of the conferences or the reason for those conferences, which is expressly required under CVLR 54(c)(A). Attorney Cox's fee request contains similar billing entries. More than ten of his entries are described as "review and respond to emails". *See id.* Without any detail as to who was included in the emails and any reason for said correspondence, the Court is left to guess at whether or not those billing entries are reasonable.

Further, Attorney Maleck requests over 30 hours in fees for entries such as "Research and draft appellate brief."; "Research various federal laws for brief."; "Research for and draft brief"; "Research and draft brief"; "Research for and draft appellate brief."; and "Read amicus brief and research for brief". *See id.* None of these entries provide an identification the specific issue(s) researched, which is expressly required under CVLR 54(c)(A).

Finally, CVLR 54(c)(A) also requires that entries describing the preparation of pleadings must include an identification of the pleading . . . and the activities associated with such preparation. On September 3, 4, 8, and 9, 2015, Attorney Adams billed a total of 23:03 hours for "Preparation of Summary Judgment motion and memo in support."; "Work on summary judgment brief. Conversation with counsel MR."; and two identical entries for "Preparation of summary judgment motion and memo.". *See id.* Without any further detail as to what activities, if any, were associated with such "preparation", the Court again is left to guess at whether or not these entries are reasonable. The rule on describing the activities associated with the preparation of pleadings logically extends to entries involving "preparation" for other matters. For example, Attorney Park billed 3.5 hours for "depositions arrangement/ preparation". *See id.* Without more, those entries do not detail whether preparation included formulating deposition questions, a review of the deposition rules, or a review of exhibits, if any. Without any further detail, the Court is unable to determine whether or not those billings were reasonable.

The attorneys' failure to provide specificity in many of their billings is inexcusable in that both the Adams and Rosman firms specialize in bringing Civil Rights actions under statutes with fee shifting provisions. A summary of the total amount charged by each attorney for those billings in which an inadequate description is given are attached as Exhibit B to the declaration of Duane Sablan.

2. A deduction of hours should be made for Overstaffing

Fees can be reduced if a case is overstaffed. *Hensley*, at 434. Courts "should ordinarily greet a claim that several lawyers were required to perform a single set of tasks with healthy skepticism." *Pearson v. Fair,* 980 F.2d 37, 47 (1st Cir. 1992) citing *Lipsett v. Blanco*, 975 F.2d 934 (1st Cir. 1992).

Here Plaintiff employed four law firms to represent him. Those four firms utilized eleven lawyers on this case. In comparison, Defendants had one assistant attorney general who represented Guam from the initial filing of the case through the Ninth Circuit appeal. (Declaration of Orcutt). After the case was remanded to the district court, Guam had two attorneys from the Guam attorney general's office and one special assistant attorney general assigned to the case. (Decl. Orcutt). This litigation did not merit the involvement of an army of lawyers for Plaintiff.

Plaintiff had too many lawyers and law firms on this case which resulted in unnecessary duplication of effort.

In *Gratz v. Bollinger*, 353 F.Supp.2d 929 (E.D. Mich. 2005) the court noted that a significant number of billing entries showed multiple attorneys charging for the same tasks or for tasks only made necessary because of the large number of attorneys involved in the litigation. For example, many entries related to telephone conferences and meetings between the attorneys and to preparation of notes, e-mails, and memoranda for the sole purpose of keeping Plaintiffs' other attorneys apprised of progress in the case. Intra-office conferencing time may be excluded where no persuasive justification is provided. *Welch v. Metropolitan Life Insurance*, 480 F.3d at 949 (noting this is especially appropriate where one of the conferencing attorneys claims "substantial experience").

Here Plaintiff's attorney billings suffer from the same defects. There are inherent inefficiencies in involving so many law firms in this litigation. A comparison of the billing entries revealed numerous instances where Plaintiff's attorneys billed for conducting conferences, discussions, telephone calls, or emails with each other. For example, on September 25, 2012, Attorney Adams billed 2 hours for "Meeting with legal team about case (MR).". On that Same day, Attorney Rosman billed 1 hour for "mtg w/ C. Adams, T. Pell, and C. Coates" *See* Sablan Decl. ¶ 9, Ex. C (Entries Relative to Conferencing). Further, on January 28, 2013, Attorney Rosman billed for "phone conference w/ D. Cox and S. Martin from GD&C; email exchanges w/ C. Adams and A. Davis re best addresses /contact number for Davis." *See id.* That same day, Attorney's Cox, Martin, and Maleck, all billed for conferences with each other. *See id.* A deduction of the attorney fees should be made for overstaffing.

3. Gibson Dunn's fees should be reduced due to unnecessary duplication of effort and work done beyond the scope of the issue appealed

Plaintiff hired the Gibson Dunn law firm for the Ninth Circuit appeal. There was no justification to retain a separate law firm for this purpose. The Election Law Center (Adams) and the Center for Individual Rights (Rosman) both possess specialized knowledge in the area of civil rights and voting litigation. The Center for Individual Rights firm has extensive appellate experience. ECF 162-9, p. 2 (listing U.S. Supreme Court and Federal Circuit Court cases where it challenged affirmative action).[4]

In *Spell v. McDaniel*, 852 F.2d 762, 769 (4th Cir.1988), the circuit court noted that plaintiff's "petition presents such an inflated expenditure of time that it is impossible for this court to cull the justified from the unjustified," and reduced allowable attorneys' hours for representing Spell on appeal from 1,431.1 to 420. 852 F.2d at 767. In reviewing several particulars of an itemized bill which the six attorneys who represented Spell on appeal presented for their services, including "[a]dditional hours [the attorneys] spent discussing the issues amongst themselves," and "extensive conferences regarding these ... issues," *id.* at 768, the court stated:

> We find that it is necessary to substantially reduce these hours to account for the duplication of effort from the trial level, and the overstaffing and overkill that is characteristic of the entire fee petition....
>
> ... We have already observed that it is inappropriate to charge defendants for duplicative endeavors and overkill on the part of newly acquired counsel.

Spell, 852 F.2d at 769.

In the case at bar, as in *Spell*, there is overstaffing and overkill, particularly as to the Ninth Circuit Appeal. At least eight lawyers are billing for time spent working on the appeal Three lawyers from Gibson Dunn did the primary work on the appeal. *See* generally, ECF 1622-22, pp.

[4] Mr. Adams' appellate experience appears to be limited to one case brought under the Voting Rights Act asserting that a County Democratic Party Committee violated the Act by intentionally diluting the voting power of white voters. ECF 162-1, p. 5; *U.S. v. Brown*, 561 F.3d 420 (5th Cir. 2009)

6-32. But attorneys Rosman and Adams also are billing for significant time related to the appeal. Mr. Rosman is billing approximately $21,000 for work on the appeal. ECF 162-15, p. 4, entry 11/26/12; ECF 162-16, pp. 2 -7, entries 1/9/13-5/26/15. Mr. Adams is billing approximately 20 hours related to the appeal. ECF 162-2, p. 7, entries 1/9/13- 6/5/15. Mr. Park is billing almost 15 hours for time related to the appeal. 162-8, pp. 4-5, entries 2/1/13 -6/3/15. To exclude this unnecessary duplication of effort, Gibson Dunn's billable hours on the appeal should be reduced.

While the time spent on the appeal is excessive because of all the attorneys involved, it is also excessive due to the nature of the decision being appealed. Plaintiff appealed this court's dismissal of Plaintiff's case for lack of standing. The standing issue was not particularly complex and resulted in a short opinion by the Ninth Circuit. *See Davis v. Guam*, 785 F.3d 1311 (9th Cir. 2015). One of the reasons, Gibson Dunn seeks such a large attorney's fee award is that its brief went beyond the issue of standing. Significant portions of Davis' appellate brief were devoted to the underlying merits of the case. Not only did this result in more hours being spent on the appeal, but it resulted in Gibson Dunn seeking over $20,000 in computer legal research fees. ECF 162-22, page 4. None of these fees and charges are reasonable.

In general, time spent researching, drafting, and preparing unsuccessful motions is not compensable. Gibson Dunn sought to have the Ninth Circuit rule on the merits of the case which the Ninth Circuit specifically declined to do. 785 F.3d 1316 ("We decline Davis's suggestion that we reach the merits of his claims in the event we find his claims to be justiciable".) Guam should not be required to pay for this unnecessary and unsuccessful briefing on the merits. *Cf.*, *Castle v. Bentsen*, 872 F.Supp. 1062, 1067 (D.D.C. 1995) (In general, time spent researching, drafting, and preparing unsuccessful motions is not compensable).

Gibson Dunn's failed effort to obtain a ruling by the Ninth Circuit on the merits of Davis' claims further justifies the reduction of the firm's fees as stated above. Its costs for computer research related to the appeal should be reduced.

4. Travel Time Should Be Reduced by 50%

Courts commonly reduce compensation for travel time by 50%. For instance, in *In re Washington Public Power Supply System Securities Litig*ation, 19 F.3d 1291, 1299 (9th Cir. 1994), the Ninth Circuit upheld the district court's 50% reduction of attorney fees sought for travel time. The Ninth Circuit reasoned that the distractions associated with travel, especially after a full day of work, likely reduced the attorneys' effectiveness while en route. *See also*, *Jeffery Etter v. Thetford Corporation*, 2017 WL 1433312, --- F.Supp.3d ---- (C.D. Cal. 2017) (reducing compensation for travel time 50% where counsel repeatedly billed for the entire time spent traveling, often without providing any indication that counsel performed substantive work for this case while in transit) and *Maceira v. Pagan*, 698 F.2d 38, 40 (1st Cir. 1983) (court provided a 50% reduction in the attorney's reasonable regular rate for travel time).

In the case at bar, a 50% reduction of fees for travel time is appropriate. Mr. Adams is billing for 24 hours time in the amount of $12,384 for a single flight to Guam from the mainland. ECF 162-2, page 2, entry of 9/19/11; ECF 162-1, page 9. This amount is in addition to the roundtrip air fare of $6440.46. During his flight, Adams' block billing notes indicate that he read from a book about Guam, "reviewed documents", "reviewed the history of Guam", and read about Guam's prior efforts to enact commonwealth and constitutions. In his 9/26/11 billing he charged 15 hours or $7740, for a number of tasks including his return flight to Washington, D.C.. While he notes that he discounted his travel time, due to the block billing, it is impossible to know how much of the 15 hours relates to time spent on the return flight.

Mr. Adams appears to have double billed for his time traveling to Saipan on September 24, 2011 to confer with his local counsel Mr. Park. ECF 162-2, page 2. Both Mr. Adams and Mr. Park bill 3 hours for their meeting that day. ECF 162-2, page 2, entry of 9/24/11; ECF 162-8. Entry of 9/24/11. However, Mr. Adams' billing statement contains two additional entries for 9/24/11: 6 hours "travel to Saipan to meet local counsel (MP). Discussion of case and claims. Discussion of Litigation plans." Mr. Adams also includes an additional 30 minutes for "Discussion with local counsel. Email from client about progress on meetings and discussion of facts learned."

On 9/15/12, Mr. Adams again flew to Guam, this time to take depositions. He charged 15 hours for his travel time, which includes preparation for depositions. ECF 162-2, page 6.[5] On his return flight on 9/22/12, he charged 12 hours for his travel time, noting that he has reduced his claim for travel time. On 11/13/12, Adams charged 12 hours for his travel time to Guam (reduced from 20 hours the flight apparently took), even though he asserts he worked on the case during flight. (ECF 162-2, page 6). On his return to the mainland on 11/16/12, he charged 12 hours of travel out of the 18 hours and apparently did no work on the flight. ECF 162-2, page 7. On August 30, 2016, Adams charged 8 hours for travel to Guam from the mainland (discounting the time from 23 hours) even though he spent time preparing for the summary judgment hearing. On September 2, 2016, he billed 14 hours for the return flight home even though he did not work during the flight. ECF 162-2, page 11. For his four trips to Guam, Mr. Adams is seeking $58,386 in attorney fees in addition to air fare, hotels, and meals etc. This is excessive and should be reduced by at least 50%.

5. Plaintiff's Attorney should not be reimbursed for his business class air fare

If the travel is unnecessarily luxurious, the court should not reimburse the plaintiffs for the entire out-of-pocket expenses of travel. *Henry v. Webermeier*, 738 F.2d 188, 194 (7th Cir. 1984). Here Mr. Adams seeks to be reimbursed over $23,000 for four roundtrip business class air fare tickets from Washington, D.C. to Guam. ECF 162-5, page 2. This amount should be reduced to $9600 representing a reasonable coach air fare for the four trips. (Decl. Orcutt.)[6]

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[5] The excessive hours spent on deposition preparation is discussed separately below.

6. Plaintiff's discovery was excessive

Judge Kozinski in his dissenting opinion in *Guam Society of Obstetricians and Gynecologists v. Ada*, 100 F.3d at 707-08 (9th Cir. 1996), addressed the appropriateness of a fee request by off-island attorneys in a case involving the constitutionality of Guam's abortion statute. Judge Kozinski, in a scathing opinion disagreed with his colleagues as to the reasonableness of the fee request. The judge was critical of the time Plaintiffs spent on discovery:

> [P]laintiffs spent much time on discovery. They noticed the depositions of Governor Joseph F. Ada; June S. Mair, a legislative staffer to the senator who had sponsored the abortion statute; and Police Chief Adolf P. Sgambelluri. They also sought and obtained such items as drafts of the abortion bills; memos from the attorney general to the police chief; crime statistics; memos from the police chief to his staff; and copies of the governor's speeches.
>
> .....None of the discovery was remotely germane to the purely legal issues presented. The questions at the depositions ranged from the irrelevant to the inappropriate.

100 F.3d 707.

Similarly, the time spent by Mr. Davis' attorneys on discovery was excessive and should be reduced.

Plaintiff's preparation time for depositions was excessive

Plaintiff's preparation time for depositions was excessive. Plaintiff sought to take the deposition of six witnesses on Guam, including former Governor Carl Gutierrez. Because Plaintiff included some block billing, it is impossible to determine exactly how much time was spent on deposition preparation and to which witness the preparation pertained, but it is clearly excessive.

[6] This amount ignores the additional benefit of the significant frequent flier miles Plaintiff's attorney accrued through these flights.

ECF 162-2, page 5-6. It appears Mr. Adams is billing for approximately 80 hours of deposition preparation for six witnesses. *Id.*

Not only was the deposition preparation excessive, the depositions of the six witnesses was unnecessary. Of these six witnesses to be deposed, only three depositions actually occurred as this court issued a stay of discovery on September 21, 2012. ECF 69. The depositions of Ron McNinch, Ed Alvarez, and Robert Klitzke were all unnecessary. Plaintiff did not use any of the depositions in support of his summary judgment. ECF 105. Instead, Plaintiff relied upon his own short declaration, the legislative history of the plebiscite statute, and an expert's declaration regarding the interpretation of the past Guam census data. ECF 105.

Plaintiff's argument that the deposition of Mr. McNinch was necessary to confirm the accuracy of the legislative history merely confirms the deposition was unnecessary. ECF 161, page 4. The legislative history speaks for itself. Similarly, Plaintiff fails to justify the deposition of the Decolonization Commission Director Ed Alvarez. Plaintiff asserts that Mr. Alvarez's testimony would have been useful "in proving the bloodline nature of the voting qualification" as well as to the "intent and effect of the [plebiscite] statute." ECF 161, page 5. These are questions of statutory interpretation and legislative intent of which lay opinion is irrelevant. Plaintiff has already agreed not to seek costs for the deposition of Mr. Klitzke. ECF 161, page 5. The attorney fees incurred for preparation of that deposition should be disallowed.[7]

The depositions of Michael Bevaqua, Jose Garrido and former Governor Carl Gutierrez, which were canceled as a result of the stay of discovery, were also unnecessary. Plaintiff recognized the depositions were not needed as he never re-noted the depositions after the case was remanded from the Ninth Circuit and discovery re-commenced. Decl. Orcutt. Not only has Plaintiff failed to justify the need to take the six depositions, but the deposition of former Governor Gutierrez was likely improper. *Cf., Guam Society of Obstetricians and Gynecologists v. Ada*, 100 F.3d at 707 (Kozinski, J., dissenting), ("the parties disagreed about whether Governor Ada could be deposed...and, in an inexplicable ruling, the district court permitted the deposition.")

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[7] It appears the deposition of Mr. Klitzke had more to do with his prior contact with Mr. Davis on possible representation in this litigation than anything involving the underlying basis for this lawsuit. (Decl. Orcutt).

Mr. Adams is billing for approximately 120 hours or approximately $61,920 for time spent preparing and taking depositions. ECF 162-2, pp. 5-6, entries for 8/26/12 through 9/21/12.[8] Mr. Park is billing for 4.75 hours devoted to deposition preparation and 24 hours devoted to the depositions themselves, ECF 162-8, page 4, entries for 8/15/12 - 9/21/12.

Plaintiff's attorney fees should be reduced due to the time spent preparing and conducting the unnecessary depositions.

Plaintiff's discovery conducted after the case was remanded from the Ninth Circuit was unnecessary

Despite Plaintiff's proclamation that this is complex litigation, from a discovery standpoint, this is not a complex case at all and required little discovery. Defendants did not depose anyone. Defendants' written discovery consisted of two separate requests for production of documents each consisting of four separate requests, and six interrogatories. Most of defendants' discovery went toward finding out how much in attorneys' fees Plaintiff had incurred and to which Plaintiff objected. Decl. Orcutt.

After the Ninth Circuit's remand, Plaintiff conducted extensive written discovery. He submitted 18 interrogatories, 19 requests for production of documents and 12 requests for admission. Decl. Orcutt. None of this discovery was necessary. As mentioned above, the record before the Ninth Circuit was such that Plaintiff argued the appellate court should rule on the underlying merits as opposed to limiting itself to the standing issue. There is no reason, Plaintiff could not have filed his

[8] Because some of these time entries consist of block billing it is not possible to determine exactly how much time was spent on deposition preparation.

motion for summary judgment immediately upon remand without conducting further discovery. Even when Plaintiff did eventually file his summary judgment motion, he did not rely on any of this post-remand discovery. ECF 105, pp. 1-5. The only discovery, including deposition testimony, referenced in Plaintiff's concise statement of material facts were three admissions made by Defendants prior to the court's initial dismissal of the action for lack of standing. Plaintiff spent approximately 10.5 hours preparing post-remand discovery requests to Defendants. ECF 162-2, pp. 9-10, entries 1/29/16 through 3/21/16. The time spent by Mr. Davis' attorneys on discovery was excessive and his attorney fees award should be reduced on this basis.

7. Plaintiff's Motion for Class Certification Was Unnecessary

In general, time spent researching, drafting, and preparing unsuccessful motions is not compensable. See, *Castle v. Bentsen*, 872 F.Supp. at 1067 (D.D.C. 1995). However, a litigant who is unsuccessful at a stage of litigation that was a necessary step to his ultimate victory is entitled to attorney's fees even for the unsuccessful stage. *Air Transp. Ass'n of Can. v. FAA*, 156 F.3d 1329, 1335 (D.C.Cir.1998). Plaintiff's motion for class certification was neither successful nor necessary.[9] This court never ruled on the motion and as admitted by Plaintiff, the injunction the court did issue after granting summary judgment, "will aide many others—blacks, whites, Japanese, Filipinos, etc. If the Plebiscite moves forward, they will have a voice." ECF 162-24, page 14. In making this admission, Plaintiff has adopted the position of Guam in its opposition to the motion to certify that the motion was not necessary since the injunctive and declaratory relief sought by Mr. Davis would benefit all of the proposed class members. *See* Opposition to Motion to Certify Class, ECF 35.

The time spent on the motion for class certification was "not reasonably expended" on the litigation and should be excluded. *Hensley v. Eckerhart*, 461 U.S. 434. This includes almost all

[9] Plaintiff's motion to certify the class is ECF 34.

billings for Center for Individual Rights (CIR) for 2/15/12 through 3/9/12. ECF 162-13, page 2- 4. CIR spent approximately 38 hours on the motion is for which it seeks over $20,000. Mr. Adams seeks approximately $1512 representing 2 hours and 56 minutes. ECF 162-2, page 4, entries for 2/22/12 and 2/26/12. Mr. Park is billing for 1.5 hours devoted to this motion or $525. ECF 162-8, page 3, entries 2/23/12 through 3/10/12.

The attorney fees time sought by Plaintiff should be reduced on this basis.

8. Time spent preparing a motion to compel which was never filed should be excluded

Mr. Adams seeks compensation for approximately seven hours spent preparing a motion to compel discovery that he never filed. ECF 162-2, p.9, entries of 5/6/16 and 5/11/16 and 5/27/16. [10] Rosman bills over 4 hours for work related to the motion to compel. ECF 162-18, 4/7/17, p/ 4, entries 5/31/16 and 6/6/16. Not only was the motion to compel unnecessary, but, as discussed above, the discovery upon which it was based was unnecessary. The attorney fees time sought by Plaintiff should be reduced on this basis.

9. Time spent reviewing the Ninth Circuit decision in *Davis v. Commonwealth Election Commission* should be reduced

Mr. Adams is claiming over three hours were spent in reviewing and discussing with his co-counsel and client the short opinion of the Ninth Circuit in *Davis v. Commonwealth Election Commission*, 844 F.3d 1087 (9th Cir. 2016). ECF 162-2, pp. 11, entry of 12/29/16. He then claims another 52 minutes were spent in reviewing the lower court's decision in the CNMI case, consulting with the attorney representing the plaintiff in the CNMI case and preparing the letter informing this court of the decision. ECF 162-2, pp. 11-12, entries of 1/3/17. In essence, Plaintiff seeks $2182 for the simple act of informing this court of the CNMI decision. These fees should be reduced as excessive.

[10] Due to Mr. Adams' block billing it is impossible to know how much time was actually spent preparing the unfiled motion.

10. The fees of Mun Su Park should be reduced

The fees of Mun Su Park should be reduced. Mr. Park's fees are not based upon the actual time he expended on the case, but upon a minimum 15 minute charge any time he worked on the case. He never charges less than 15 minutes for any task. *See* generally, ECF 162-8. An award may "be reduced to account for any inaccuracies and overbilling that may have occurred as a result of [plaintiffs'] unacceptable timekeeping habits." *See Citizens for Responsibility & Ethics in Washington v. U.S. DOJ*, 825 F.Supp.2d 226, 231 (D.D.C.2011) (citing *468 Berkeley v. Home Ins. Co.*, 68 F.3d 1409, 1419–20 (D.C.Cir.1995)). Courts have disapproved billings to quarter hour increments. *See*, e.g., *Am. Civil Liberties Union v. U.S. DHS*, 810 F.Supp.2d 267, 278–79 (D.D.C.2011); *A.C. ex rel. Clark v. Dist. of Columbia*, 674 F.Supp.2d 149, 157 (D.D.C.2009); *Blackman v. Dist. of Columbia*, 59 F.Supp.2d 37, 44 n. 5 (D.D.C.1999), abrogated on other grounds by *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 610, 121 S.Ct. 1835, 149 L.Ed.2d 855 (2001).

Mr. Park's billings indicate he did little other than "review" documents and bill for clerical or ministerial tasks for which he is not entitled to be compensated. He is billing for 24 hours as time he spent at depositions in this case, even though he did not actively participate in the depositions. ECF 162-8, page 4, entries for 8/15/12-9/21/12. Decl. Robert Weinberg. Mr. Park bills 1.5 hours for reviewing the Ninth Circuit's short opinion in *Davis v. Guam,* which reversed this court's prior dismissal of this action on standing, and an additional 15 minutes reviewing the mandate from the Ninth Circuit. ECF 162-8, entry for 5/9/15 and 6/3/15.

Mr. Park's fee request should be reduced by 50%.

11. Attorney's fees sought for Clerical or Ministerial tasks should be deducted from the lodestar calculation

Clerical or ministerial costs are part of an attorney's overhead and are reflected in the charged hourly rate. *HRPT Props. Trust v. Lingle*, 775 F. Supp. 2d 1225, 1241 (D. Haw. 2011); *Missouri v. Jenkins by Agyei*, 491 U.S. 274, 288 n.10 (1989) ("Of course, purely clerical or secretarial tasks should not be billed at a paralegal rate, regardless of who performs them."). Such non-compensable clerical or ministerial tasks include reviewing Court-generated notices; scheduling dates and deadlines; calendaring dates and deadlines; notifying a client of dates and deadlines; preparing documents for filing with the Court; filing documents with the Court; informing a client that a document has been filed; personally delivering documents; bates stamping and other labeling of documents; maintaining and pulling files; copying, printing, and scanning documents; receiving, downloading, and emailing documents; and communicating with Court staff. *Honolulu Academy of Arts v. Green*, 2017 WL 1086224, p. *11.

Counsel billed for a number of clerical tasks such as preparing/filing/sending documents, scheduling, and preparing exhibits. This time should be deducted from the lodestar calculation. *See*, e.g., ECF 162-2, p. 4, entry of 2/26/12; p.5, entry of 6/8/12, p. 3, entry of 11/14/11, p. 7, entry of 11/14/12, p. 8, entry of 10/30/15, p. 9, entries of 11/19/15 and 12/4/15, p. 10, entries of 3/24/16, and 4/8/16, and p. 11, entry of 8/26/16. Plaintiff's attorney fees should be reduced on this basis.

C. PLAINTIFF IS NOT ENTITLED TO BE REIMBURSED EXPERT FEES

Plaintiff is seeking $3525 as reimbursement for fees paid to its experts. Such fees are not compensable. In *West Virginia University Hospital, Inc. v. Casey*, 499 U.S. 83, 111 S.Ct. 1138, 113 L.Ed.2d 68 (1991), the Court held that § 1988 does not convey authority to shift expert fees in civil rights litigation to the losing party and that when experts appear at trial they are eligible for the fee provided by 28 U.S.C. §§ 1920 and 1821, but that the prevailing party may not be awarded more than this amount for expert witnesses' trial testimony and is not entitled to anything for services rendered by experts in a nontestimonial capacity. *Casey*, 499 U.S. at 101-02, 111 S.Ct. at 1148.

III. SUMMARY

District courts can reduce fee awards by percentages as long as they provide clear and concise reasons for a percentage approach and explain the precise reason for the reduction made. *Camacho v. Bridgeport Financial*, 523 F.3d 973 (9th Cir. 2008). When a district court reduces either number of hours or lodestar by a percentage greater than 10 percent, it must provide a clear and concise explanation why it chose the specific percentage to apply. *Gonzales v. City of Maywood*, 729 F.3d 1196 (9th Cir. 2013). This court should make the following award of fees and costs:

A. Mun Su Park's fees and non-Taxable Costs

Mun Su Park's fees should be reduced 50% to $14,125. This reduction is justified because: 1) Mr. Park overbilled as he bills in 15 minute increments instead of the actual time spent on the case; 2) Mr. Park did little substantial work on the case and his billing statements lack specificity in violation of CVLR 54. He is charging for "reviewing" documents and is billing for 24 hours spent at depositions in which he did not participate; and 3) Plaintiff's attorneys overbilled and overstaffed this case. Overbilling of the appeal of the Ninth Circuit is particularly egregious and Mr. Park has billed for 15 hours spent on the appeal.

Mr. Park should be awarded taxable costs of $126.65 and $0 in non-taxable costs.[11] Mr. Park's request for $240 costs for "non-legal personnel/messenger" should be denied because Plaintiff fails to provide any explanation for these charges. *See* ECF 162-8, p.8.

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[11] As noted by Plaintiff, these costs are being sought in Plaintiff's bill of costs and are not properly considered in his motion for attorney fees. *See* ECF 162-24, p. 24, fn. 8.

B. Gibson Dunn's fees and non-Taxable Costs

Gibson Dunn should have their billable hours reduced by 40% to 236 hours. These billable hours should be charged at the Guam rate for experienced attorneys which is $350 per hour. The court should award Gibson Dunn $86,600 for its appeal to the Ninth Circuit. This reduction is justified due to 1) the excessive number of attorneys and law firms billing for the appeal of the standing issue; 2) Gibson Dunn's unnecessary and unsuccessful briefing on the underlying merits of the case (as opposed to the standing issue) to the Ninth Circuit; 3) Gibson Dunn's block billing and failure to comply with CVLR 54, which makes it impossible to assess how much time was reasonably spent on the appeal.

Gibson Dunn's costs should be reduced. The firm seeks over $20,000 for legal research. ECF 162-22, p. 29. Over $10,000 of this legal research was incurred on one day. *Id.* Gibson Dunn's computer research fees are excessive and should be reduced to a total $5,000. The firm also seeks $1560.80 for "in house duplication. *Id.* These expenses are not justified by Plaintiff and should be reduced by 50%. The firm seeks $472 for shipping some unidentified object to Guam. ECF 162-22, p. 29, entry 8/19/14.These costs should be denied. The non-taxable costs requested by Gibson Dunn should be reduced to $8,395.

C. The Election Law Center's (Adams) fees and non-Taxable Costs

The Election Law Center (Adams) billable hours of 719 hours and 34 minutes should be reduced by 50% to 360 hours. These billable hours should be charged at the Guam rate for experienced attorneys which is $350, resulting in an award of $126,000. This reduction is justified by 1) Adams' block billing and failure to comply with CVLR 54; 2) the excessive number of attorneys and law firms involved in this litigation, particularly on the Ninth Circuit appeal; 3) Adams billing for unnecessary motions such as the motion to compel he never filed, and the motion for class certification which was never ruled on; 4) Adams' billing for unnecessary discovery such as the depositions he never used as part of the summary judgment motion, and deposition preparation for depositions which never occurred; and 5) Adams' excessive billing for travel time to and from Guam which includes one day where he bills for 24 hours at over $500 per hour.

Mr. Adams' costs should also be reduced. His costs for air fare to Guam should reduced from over $23,000 to $9600. His expert fees of $3525 are not recoverable. With these reductions, Mr. Adams recoverable costs are approximately $11,764.

D. Center for Individual Rights (Rosman) fees and non-taxable Costs

Center for Individual Rights (Rosman) billable hours of 453.3 hours should be reduced by 50% to 227 hours. These billable hours should be charged at the Guam rate for experienced attorneys which is $350, resulting in an award of $79,450. This reduction is justified by 1) Rosman's block billing and failure to comply with CVLR 54; 2) the excessive number of attorneys and law firms involved in this litigation, particularly on the Ninth Circuit appeal which resulted in unnecessary duplication of effort and inefficiencies; and 3) Rosman's billing for unnecessary motions such as the motion to compel he never filed, and the motion for class certification which was never ruled on.

IV. CONCLUSION

This court should make the following award of $306,175 attorneys' fees and $20,409 costs:

A. Law Offices of Mun Su Park: $14,125 in attorney fees; $0 in non-taxable costs.

B. Gibson Dunn: $86,600 in attorney fees; $8,395 in non-taxable costs.

C. Christian Adams: $126,000 in attorney fees; $11,764 in non-taxable costs.

D. Rosman Firm: $79,450; $250 in non-taxable costs.

Respectfully submitted this 8th day of May, 2017.

OFFICE OF THE ATTORNEY GENERAL
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By: ______________________________
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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the forgoing electronically with the Clerk of Court via the CM/ECF System or email to the following:

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